INDEX

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A39 089 782 - El Paso

Date: FEB 19 1999

In re: CARLOS RAFAEL VALLE-CEBALLOS a.k.a. Carlos Valle

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: Barbara Cigarroa
Assistant District Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] - Controlled substance violation

Lodged: Sec. 212(a)(2)(C), I&N Act [8 U.S.C. § 1182(a)(2)(C)] - Controlled substance trafficker

APPLICATION: Cancellation of removal

I. BACKGROUND

In a decision dated July 24, 1998, an Immigration Judge found the respondent removable as charged, but granted him cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The Immigration and Naturalization Service has appealed the grant of relief. The appeal will be dismissed.

The respondent is an approximately 20-year-old native and citizen of Mexico. He was admitted to the United States as a lawful permanent resident on or about October 31, 1984. On August 11, 1997, the respondent was convicted in the 41st IMPACT District Court of

El Paso County, Texas, for the offense of unlawful possession of marijuana, between 50 and 2,000 pounds, in violation of Texas Health and Safety Code § 481.121(b)(5).[1] See Exh. 2. The respondent received a sentence of 7 years of community supervision.

Based upon this conviction, the Service issued a Notice to Appear dated May 15, 1998, which charged the respondent as inadmissible to the United States under sections 212(a)(2)(A)(i)(II) and (2)(C) of the Act, 8 U.S.C. §§ 1182(a)(2)(A)(i)(II) and (2)(C), as an alien convicted of a controlled substance violation and who is a controlled substance trafficker.[2] See Exh. 1.

The respondent, who did not have representation, conceded his inadmissibility before the Immigration Judge. The respondent applied for cancellation of removal under section 240A(a) of the Act, and submitted supporting evidence. The Service did not object to a grant of relief in the exercise of discretion. Rather, the Service's objection was that the respondent, as an alien who had been convicted of an aggravated felony, was statutorily ineligible for section 240A(a) relief. It cited United States v. Hinojosa-Lopez, 130 F.3d 691 (5th Cir. 1997), which held that a Texas felony conviction for possession of marijuana is an "aggravated felony" under the federal Sentencing Guidelines.

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[1] The respondent was convicted under the following language:

> § 481.121. Offense: Possession of Marihuana
>
> (a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana.
>
> (b) An offense under Subsection (a) is:
>
> . . . .
>
> (5) a felony of the second degree if the amount of marihuana possessed is 2,000 pounds or less but more than 50 pounds; and
>
> . . . .

Texas. Health and Safety Code § 481.121 (1997).

[2] The events leading to the respondent's conviction occurred while he was attempting to cross the border from Mexico to Texas. Hence, he has been charged under section 212(a) of the Act.

The Immigration Judge found that United States v. Hinojosa-Lopez, supra, was distinguishable because it involved the Sentencing Guidelines rather than the Act. She found that under Matter of L-G-, Interim Decision 3254 (BIA 1995), the respondent's conviction was not an aggravated felony under section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43) (defining "aggravated felony" for immigration purposes). Accordingly, he was statutorily eligible for cancellation. The Immigration Judge also found that in consideration of the respondent's equities and the non-objection of the Service, the respondent deserved a favorable exercise of discretion. Accordingly, relief was granted.

The Service has appealed this decision. The respondent has not submitted a statement on appeal. On review, we find that the appeal should be dismissed.

II. CANCELLATION OF REMOVAL

Section 240A(a) provides that a lawful permanent resident may seek cancellation of removal if the statutory prerequisites for that relief have been satisfied. The respondent ultimately must establish that he or she deserves a favorable exercise of discretion. See Matter of C-V-T-, Interim Decision 3342 (BIA 1998). The prerequisites for section 240A(a) relief are that the alien:

> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

The only issue before us is whether the respondent's conviction for unlawful possession of marijuana precludes his eligibility under section 240A(a)(3).

III. DETERMINING WHETHER THE RESPONDENT'S CONVICTION IS FOR AN AGGRAVATED FELONY

Section 101(a)(43)(B) of the Act defines an aggravated felony as:

> illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substance Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code).

In determining whether a state drug offense qualifies as an aggravated felony under section 101(a)(43)(B) of the Act, the Board has essentially established a two-pronged test called the Davis/Barrett test. See Matter of L-G-, supra, at 5 (citing Matter of Davis, 20 I&N Dec. 536 (BIA 1992); Matter of Barrett, 20 I&N Dec. 171 (BIA 1990)). The Service has argued that the respondent's conviction fits the second prong of the Davis/Barrett test.[3] Here, the Board has held that a state drug offense qualifies as a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) if it is punishable as a felony under the Controlled Substance Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.). See Matter of L-G-, supra.

The respondent's conviction is for unlawful possession of marijuana. In Matter of L-G-, supra, at 3-4, we explain that the Controlled Substance Act at 21 U.S.C. § 844(a) criminalizes simple possession of controlled substances. However, only possession of more than 5 grams of a mixture or substance which contains "cocaine base" is punished as a felony. There are also circumstances where the existence of prior drug convictions will render possession a felony. Id. As the respondent's single drug conviction under Texas law involves possession of marijuana, and there is no evidence of prior convictions, we find that his offense is not analogous to a felony under the Controlled Substance Act. Therefore, the respondent's state felony conviction is not an aggravated felony within the meaning of section 101(a)(43)(B) of the Act.

Further, we reject the Service's argument that the decision of the United States Court of Appeals for the Fifth Circuit, which held that a Texas felony conviction for possession of marijuana is an aggravated felony under the Sentencing Guidelines, mandates a parallel finding under the Immigration and Nationality Act. Indeed, the case in question, United States v. Hinojosa-Lopez, supra, specifically and only addresses the term aggravated felony as used in § 2L1.2(b)(2) of the Sentencing Guidelines. Moreover, we consider that the Fifth Circuit adopted the approach taken by the First Circuit in United States v. Restrepo-Aguilar, 74 F.3d 361 (1st Cir. 1996) (finding that the term aggravated felony includes a state felony drug possession offense that would only be a misdemeanor under federal law). In its decision, the First Circuit rejected the reasoning of Matter of L-G-, supra, because the Board's holding was inconsistent with the Second Circuit's holding in Jenkins v. INS, 32 F.3d 11 (2d Cir. 1994) (alien's state conviction for a drug offense that is a felony under state law, but a misdemeanor under federal law, qualifies as a conviction for an aggravated felony), and similar cases. The Second Circuit, however, has vacated its holding in Jenkins. See Aguirre v. INS, 79 F.3d 315 (2d Cir. 1996) (adopting the Board's reasoning in Matter of L-G-, supra). Since the

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[3] Under the first prong, a state drug offense is an aggravated felony if it is a felony under state law and has a sufficient nexus to unlawful trading or dealing in a controlled substance to be considered "illicit trafficking" as commonly defined. Matter of L-G-, supra, at 5. The Service has not contended that the respondent meets this prong, so it will not be discussed further.

Fifth Circuit has not issued a decision rejecting our interpretation of section 101(a)(43)(B) of the Act, as articulated in Matter of L-G-, supra, we decline to follow precedent that only interprets the Sentencing Guidelines.[4]

Accordingly, we agree with the Immigration Judge that the respondent's conviction is not one for an aggravated felony.[5] The respondent is not barred from cancellation of removal.

IV. CONCLUSION

The respondent is statutorily eligible for cancellation of removal. Furthermore, the Service has not objected to granting this relief on discretionary grounds, and our review of the record supports the conclusion that the respondent deserves relief from removal. Accordingly, the appeal will be dismissed.

ORDER: The appeal of the Service is dismissed.

FOR THE BOARD

[4] On appeal, the Service emphasizes that Application Note 1 of the Commentary of § 2L1.2 states that: "Aggravated Felony," is defined at 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the aggravated felony. We do not find the insertion of this language to mandate an alternative outcome in the current case. We point out that this language was not discussed in United States v. Hinojosa-Lopez, supra, and its application would lead us back to Matter of L-G-, supra, in any event.

[5] We point out that the Board has distinguished the process of determining drug-related "illicit trafficking" for purposes of finding an "aggravated felony" from the process of determining whether an alien is excludable under former section 212(a)(23) of the Act (currently designated as section 212(a)(2)(A) of the Act). Matter of Davis, supra, at 541-42 n.5.